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Supreme Court, U.S.
FILED
NOV 26 2002
OFFICE OF THE CLERK

No. 01-1243

In the Supreme Court of the United States

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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The government and its amici set forth a remarkably expansive view of federal authority over activity that occurs in and around wetlands. According to them, a "discharge" is involved—and a permit required—whenever an activity *disturbs* soil within a wetland. The limits that Congress placed on federal regulatory power in the CWA are on this view meaningless: an "addition" occurs though nothing is added to the wetland; rich native soil turned by the plow to prepare it for crops becomes a "pollutant"; and a plow shank is a "point source" though it neither "confine[s]" nor "convey[s]" anything. *Cf.* 58 Fed. Reg. 45008, 45020-45022 (asserting that even "bicycling * * * through a wetland" is a "discharge activity" for which a permit is required unless there are "only de minimis environmental effects").

Having first claimed authority over deep plowing by stretching each of the key statutory concepts beyond recognition, the agencies keep that authority by turning Congress's exemption for "normal farming and ranching activities such as plowing" into an illusion. According to the government, deep plowing is not "normal farming activity," though the district court found, and petitioners' agricultural amici confirm, that it is a "technique of plowing used by farmers throughout the nation in preparation for the planting of deep-root crops." Pet. App. 35. In any event, the government asserts, the exemption does not apply if plowing changes the wetland's hydrology (which all plowing does) or is in preparation for a new type of crop with different hydrological requirements.

These theories are at odds with the CWA's language and legislative history and should be rejected. One of their pernicious effects is to undermine Congress's goal—nowhere acknowledged in the government's brief—"to recognize, preserve, and protect the primary responsibilities and rights of States to * * * eliminate pollution" and "plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b); see *SWANCC*, 531 U.S. at 173-174. As ten States have informed this Court—including such important

agricultural States as Illinois, Kansas, Nebraska, Ohio, and Pennsylvania—the agencies' "uniquely creative interpretation" of the CWA operates at the expense of state authority, destroying "the balance of powers between federal and state governments established by the Act." Amicus Br. of Alabama, *et al.*, at 2. Another harmful effect is to deter farmers and ranchers from making efficient use of their land, for who would dare plow seasonally soggy soil at all when changing its hydrology could result in massive penalties?

1.a. The government does not dispute that the proscription and permit requirements in Sections 301 and 404 apply only to "point sources," but contends that the statutory definition can be expanded to include deep plowing equipment. U.S. Br. 32-35. The statutory text and structure refute that argument, and the agencies' administration of the CWA for the past 30 years undermines it further.

The statutory definition in Section 502(14) does not explicitly include deep plows or any other agricultural implement. A "point source" is "any discernible, confined and discrete conveyance." Congress then supplied examples: "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Since deep plows are not mentioned in this list, the issue is whether the words "discernible, confined and discrete conveyance" may be construed to encompass them.

The government makes no effort to apply standard tools of statutory construction to this question. Instead, it suggests that the test is whether something "is readily identifiable," "occupies a specific physical space," and is "separate, and therefore distinguishable, from other sources of pollutants." U.S. Br. 33. That formulation substitutes broader words for those enacted by Congress, and results in an unworkable standard since it includes things that the government itself concedes are not point

sources. Even the government's quintessential example of a nonpoint source, the timber ranch in *Pronsolino* v. *Nastri*, 291 F.3d 1123 (9th Cir. 2002), is readily identifiable ("800 acres * * * in the Garcia River watershed," *id.* at 1129), occupies a specific physical space (*ibid.*), and is separate and distinguishable from other sources (*id.* at 1130 n.6, affirming imposition of controls on timber harvesting to reduce sediment runoff from that specific ranch). A construction of "point source" that excludes nothing from its reach is surely suspect.[1]

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The critical statutory terms here are the words "confined" and "conveyance," since most tangible objects are "discernible" and "discrete." In analyzing statutory language, dictionary definitions are useful, *Williams* v. *Taylor*, 529 U.S. 420, 431-432 (2000), and in this case undercut the government's position. A standard dictionary definition of the adjective "confined" is "kept in confines." WEBSTER'S THIRD NEW INT'L UNABRIDGED DICT. (1971) ("WEBSTER'S THIRD"). Relevant definitions of the (usually plural) noun "confine" in turn include "constricting limits (as of an area of activity or operation)" and "enclosed or otherwise limited space or area." *Ibid.* See, *e.g.*, 29 C.F.R. § 1910.146(b) (2002) (OSHA regulation defining a "confined space" as an enclosed space with "limited or restricted means for entry or exit," such as "tanks, vessels, silos, storage bins, hoppers, vaults, and pits"). The ordinary meanings of "confined" thus suggest that a point source is an enclosed spot from which pollutants are or may be discharged. A deep plow shank is an implement pulled through the soil to break it up and

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[1] The government (at 33) contends that the undefined term "nonpoint source" informs the meaning of the defined term "point source." The government cites no authority for this upside-down approach, and we are aware of none.

turn it over. It does not enclose or confine anything, and therefore cannot be a point source. The dictionary definition of "conveyance" also undercuts the government's argument, because it denotes "a means or way of conveying," "carrying, transporting," and "serving as a means of transportation." WEBSTER'S THIRD. Plows, deep or shallow, do none of those things.

The statutory context of the words "confined" and "conveyance" leads to the same conclusion. "[A] passage will be best interpreted by reference to that which precedes and follows it." *Neal* v. *Clark*, 95 U.S. 704, 708 (1878). Under the maxim *ejusdem generis*, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). Although the government's brief (at 33) touches on the specific examples of point sources in the definition, it does not draw any comparisons between those examples and the plowing activity at issue here—for the simple reason that there are none.

None of the examples in Section 502(14) resembles deep plowing equipment. The first seven—pipe, ditch, channel, tunnel, conduit, well, discrete fissure—are all means by which liquids can be moved from one place to another. All are normally stationary, and in common understanding are the outfalls from industrial facilities and sewage works, sources that were the primary focus of the CWA when the definition of "point source" was adopted. Pet. Br. 29. It would be a very peculiar use of language to construe any of them to include plows of any type. See Pet. Br. 25 n.14.

Nor are the remaining examples directed to plows. Containers, rolling stock, concentrated animal feeding operations, and vessels and other floating craft are each specific (and unrelated) sources of pollutants that Congress chose to

include in the category of point source.[2] If these suggest anything, it is that when Congress wanted to include something other than the outfall from an industrial plant or sewage works in the category of point source, it did so explicitly. The fact that deep plows are not meaningfully like any of the listed examples shows that the government's expansive reading is wrong.[3]

The CWA's structure confirms this conclusion. In addition to the narrow permit scheme applicable to point source discharges of dredged or fill material created by Section 404, Section 402 established a National Pollutant Discharge Elimination System applicable to point source discharges of all pollutants. *Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981) ("[e]very point source discharge is prohibited unless covered by a permit" under the NPDES); *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976). Since Sections 402 and 404 apply to the same kind of source and rely on the same definition of the source, the general CWA provisions concerning point sources under either Section are illuminating. *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986) (identical words used in different portions of statute generally have the same meaning). Those provisions include considerable detail about what categories of facilities must have permits, what levels of treatment are required for each category,

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[2] Contrary to amicus NWF, deep plowing equipment is not "rolling stock," which specifically refers to "the wheeled vehicles * * * owned and used by a railroad [or] motor carrier." WEBSTER'S THIRD.

[3] In *Akers*, see U.S. Br. 34 n.22, a chisel plow or ripper was used in a wetland as one small part of a plan "for the leveling and filling of the Big Swamp" through construction of a huge 3-mile dike using "[h]eavy earth-moving equipment." 15 Envtl. L. Rep. at 20244. Nothing in either the district court's or Ninth Circuit's opinions suggests that the ripper or any plow was treated as a point source, as opposed to the heavy earthmoving equipment, such as a "grader," that was used to build the dike. 785 F.2d at 817, 819.

and what EPA is required to do concerning each. 33 U.S.C. § 1311(b)-(m) (effluent limitations for different categories of point sources); § 1314(b), (d) (level of treatment required of industrial and municipal point sources); § 1316(b) (categories of point sources required to meet new source performance standards). Nothing in those sections remotely addresses plowing of any kind or other agricultural activities.[4]

EPA's administration of the CWA recognizes that this kind of activity is not a point source. Section 304 directs the Administrator to develop technical data and promulgate guidelines to facilitate regulation of point sources. *E. I. DuPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 116 (1977). EPA is also required "to publish regulations providing guidance for effluent limitations on existing point sources." *Ibid.* The list set forth in 33 U.S.C. § 1316(b) includes 27 categories of point sources; EPA has identified and promulgated regulations for additional categories. 40 C.F.R. Parts 400-471. Yet *none* of the categories identified remotely encompasses plowing, ripping, chiseling, or any form of mechanized cultivation, and EPA has never recognized plows or ripper shanks, or the equipment that pulls them, as point sources under 33 U.S.C. § 1314(b).

Finally, the government's constant reference in its brief to a broad and generic category of "earthmoving equipment" as "point sources" is no substitute for close analysis of the sources of pollution that Congress actually authorized the agencies to regulate. Whether or not backhoes, mechanical shovels, graders, dump trucks and other heavy construction equipment that captures and confines material to move it elsewhere may be point sources, that sort of earthmoving equipment is completely

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[4] As we pointed out (Pet. Br. 28), when the CWA does address "agricultural and silvicultural activities" (§ 304(f)(2)(A))—the kind of activity that gave rise to this case—it categorizes them as "nonpoint sources of pollution." The government does not mention Section 304(f) and does not respond to this argument.

different from a deep plow, which is simply a shank pulled through soil by a tractor or other equipment in order to prepare the land for planting. No reasonable construction can turn a plow shank into a "confined" "conveyance."

1.b. Native soil loosened and turned by deep plowing to plant deep-rooted crops is not a "pollutant" subject to Section 404.[5] Section 404 requires a permit only for the discharge of a subset of "pollutants," "dredged or fill material." Native soil cultivated for productive agricultural use is neither dredged nor fill material within the Act's plain language or as defined by EPA or Corps regulations.

The district court correctly concluded that deep plowing does not involve dredged material. Pet. App. 38 n.7. Corps and EPA regulations define dredged material as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2. Excavated material is material "d[ug] out and remove[d]" or that results from forming

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[5] The government incorrectly asserts that we have waived this argument. The district court found that petitioners discharged a "pollutant" in the form of "fill" material. Pet. App. 38 n.7. Petitioners argued on appeal that plowed soil is not "fill." CA Br. 25. The court of appeals rejected petitioners' argument that nothing was added to the wetland as a pollutant. Pet. App. 6-8. The holding below that plowed soil is a pollutant was a necessary predicate of the decision since only an addition of a pollutant requires a permit. Petition Question One explicitly presents the issue whether plowing adds a "pollutant." See Pet. i, 5-6, 17, 19. So does the government's restatement of the first question presented in its brief in opposition, in which waiver was not alleged. Br. in Opp. i, 10. See Sup. Ct. Rule 15.2; *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989). The parties and amici have fully briefed the issue, which is fairly subsumed in the questions presented for decision and integral to the meaning of the statutory term "discharge." See *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-382 (1995); *Arkansas Elec. Coop.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983).

a "cavity" by "cutting, digging, or scooping." WEBSTER'S THIRD. Dredged material is material "ca[ught], gather[ed], or pull[ed] out by a dredge." *Ibid.* A dredge is "a machine for scooping up or removing earth (as in excavating or deepening stream or harbor channels, building levees, or digging ditches), usu[ally] by a series of buckets on an endless chain, a pump or suction tube, or a single bucket or grab at the end of an arm." *Ibid.* Deep plowing does not dig, scoop, or cut material out of a wetland, and does not involve a bucket, pump, or suction tube. Deep plowing, as the district court observed, drags a narrow shank through the soil to "break up, mix, homogenize, loosen, aerate, and horizontally move soil" to prepare it for planting. Pet. App. 36. EPA regulations list examples of activities that could produce dredged material, including "mechanized landclearing, ditching, channelization, or other excavation." 40 C.F.R. § 232.2. None is remotely like deep plowing.

Deep plowing also does not involve fill material. During the relevant time period, the Corps defined fill material as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 C.F.R. § 323.2(e) (1994);[6] see also WEBSTER'S

[6] EPA regulations defined fill material as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. § 232.2 (1994). That the EPA and Corps differently defined a term of enormous importance to those potentially regulated by the CWA and potentially subject to large civil penalties or criminal prosecution is, to say the least, puzzling. After the Ninth Circuit's decision in this case, the Corps and the EPA changed their definitions of fill material to "material *placed in* waters of the United States where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water." 67 Fed. Reg. 31129 (May 9, 2002) (emphasis added). The soil affected by

THIRD ("fill" or "fill material" is "material used to fill a receptacle, cavity, or passage"). Plowing, which includes "all forms of primary tillage," "prepare[s] [soil] for the planting of crops." 33 C.F.R. § 323.4(a)(1)(iii)(D). The soil affected by plowing is not used to fill a cavity or to replace an aquatic area, but is broken up, turned, and aerated for the primary purpose of preparing the soil to produce crops by hydrating deep roots. See California Farm Bur. Amicus Br. 10-11 & n.8.

The Corps understood that the discharge of fill material results from activities such as "construction of any structure or infrastructure" in a wetland, "site-development fills," "causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices," "beach nourishment; levees," and "structures such as sewage treatment facilities." 33 C.F.R. § 323.2(f). Each of these activities has as its purpose filling water with material so that it is possible to create artificial structures, recreational areas, or roads. Plowing to grow crops is categorically different from any of these activities. Accordingly, the Corps expressly recognized that "the term [discharge of fill material] does not include plowing * * * for the production of food." *Ibid.*; see also RGL 86-01 ("Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredged or fill material").[7]

deep plowing would not be fill material under the new definition because the movement of soil within a wetland associated with plowing places no material in the wetland.

[7] Respondents' shopping center example (at 24 n.16) is not analogous to plowing. Shopping centers pave over and fill "waters" with concrete and impervious surfaces, displacing any hydrologic function. By contrast, farmers are stewards of the land who plow and preserve it to cultivate crops; they do not grade land and pave over it to construct shopping centers. Native soil bulldozed and compacted into a section of a wetland as a base for construction of a shopping

Native soil turned and loosened by deep plows is not dredged or fill material and it is not a pollutant. The Act defines "pollutants" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6). None of these terms describes rich native soil (not "rock" or "sand" or "cellar dirt" or "dredged spoil") in which crops are to be grown.[8] And "biological material," in the context of the statute's other examples, means not anything at all that ultimately derives from a living organism, but biological wastes. See *Ass'n to Protect Hammersley, Eld, & Totten Inlets* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002) (to be in the same category as the other statutorily enumerated pollutants, "biological materials" must mean waste material); *Circuit City*, 532 U.S. at 114-115. Furthermore, even if agricultural soil could be considered rock, sand, or biological material, these and other *potential* pollutants logically become actual pollutants only when extracted from their original location and discarded as waste or placed as fill in a wetland area. Deeply plowed soil that is to be used to grow crops *in situ* is not dredged material, fill material, or any other pollutant.

I.c. In an effort to show that deep plowing within a wetland results in the "addition" of a pollutant, the government paints a picture (at 25-27) of plow shanks dragging soil from adjacent uplands into the wetland and also pulling into the wetland soil from the hardpan and below. This argument—which appears nowhere in the Corps' 1996 Field Memorandum on deep plowing (Pet. App. 199-207)—proves too much, making

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center may well be a pollutant. Native soil broken up and aerated with a deep plow so water can better reach the roots of crops is not.

[8] Neither the term "earth" nor the term "dirt," which the government repeatedly uses at U.S. Br. 22-24, appears in the statute.

nonsense of the agencies' regulations. Those regulations recognize that "[t]he term discharge * * * does not include plowing" (33 C.F.R. § 323.2(f)), meaning "all forms of primary tillage." *Id.* § 323.4(a)(1)(iii)(D). Yet *all* types of plowing have a similar effect. See Pet. App. 36 (deep ripping and shallower disking work soil in same way); AFBF Amicus Br. at 11, 13 (goal of all plowing is hardpan penetration); Tr. RT 519-522, TE 678Q, ER 286 (restrictive soil layer on Borden Ranch, government's expert testified, occurred at depths as shallow as four or five inches). If deep plowing with a ripper or chisel plow pulls some adjacent upland soil and hardpan into a wetland, and if that is enough to constitute an "addition" of a pollutant, then so do disking, moldboard, wide-blade, and all other forms of plowing, and the Corps' regulations stating that one may plow in a wetland without causing a "discharge" are meaningless and misleading.

The government also distorts the district court's factual findings. The district court recognized that Borden Ranch's deep plowing predominantly "turn[ed] over material already in the" wetlands, which the district court incorrectly believed was enough for a "discharge." Pet. App. 36; see also Pet. App. 86-88 (finding numerous swales and drainages filled without finding that soil entered the wetland from outside). Only in the case of three jurisdictional features (out of 29) did the court find that soil had been deposited from uplands, and only then as a result of adjacent *upland* plowing. Pet. App. 89; Pet. App. 34-35 n.5 (under 33 C.F.R. § 323.2(d)(3)(i), "any incidental addition * * * associated with" upland activities does not require a permit). Though the government would convert the court's observation that deep plowing results in some movement of the soil "horizontally and vertically" into a specific finding that soil entered the wetland from outside, the district court made no such finding, and the Ninth Circuit did not suggest that was the effect of Borden Ranch's deep ripping either. See Pet. App. 6, 36 (focusing on "redeposit" of soil from within wetland); UNIV.

OF CAL. DIV. OF AG. SCIENCES, MANAGING AND MODIFYING PROBLEM SOILS 6-10 (Apr. 1982) ("Rippers break up hard layers by cracking and shattering; there is little mixing or dislocation of layers. * * * Upon wetting and drying, clay layers usually reseal"). That neither court was interested in such details is not surprising, for both believed, as the government also contends, that the source of agency authority lies in identifying harm to a wetland, not in carefully ascertaining if each requirement of Section 404 jurisdiction has been met. See, *e.g.*, Pet. App. 8, 38-39; U.S. Br. 27 & n.18, 31.

The government's contention (at 27-31) that no "addition" is necessary—that small movements of soil within a wetland of the sort caused by deep plowing are enough—is at odds with *National Mining*, where an "addition" would have been involved had the test urged by the government here been applied. It is at odds with the plain meaning of the term "addition," which requires that something be added. *Cf.* Pet. App. 8 (through Borden Ranch's plowing "no new material has been 'added'"). And it is at odds with Section 404(a)'s application only to discharges made "at specified disposal sites." By no stretch of the imagination can deep plowing to grow crops be said to move plowed soil to a "specified disposal site"—language the government makes no effort to explain. See *National Mining*, 145 F.3d at 1410 (Silberman, J. concurring) (both terms show Congress had in mind "temporal or geographic separation between excavation and disposal"). *Deaton*, upon which the government places great weight, is irrelevant, for it involved digging a 1240-foot ditch, which produced a statutorily identified pollutant ("dredged spoil") that was lifted out of the wetland then returned to it elsewhere from a point source (a bucket)—an operation bearing no resemblance whatever to plowing to turn soil in place to make it more productive for crops.

1.d. The CWA's plain language shows that deep plowing does not result in the discharge of dredged or fill material.

Congress's definitions of "discharge," "point source," and "pollutant" and choice of the word "addition" exclude plowing from any of Section 404's provisions. These statutory terms and definitions, as well as regulations and guidance that interpret them not to reach plowing, remained intact after Congress added Section 404(f) in 1977. See 42 Fed. Reg. at 37124 (1977) ("The [1975] regulations * * * identified certain types of activities that were excluded from the program *because they do not involve the discharge of dredged or fill material into water*. Plowing * * * for the production of food * * * w[as] included in this list of excluded activities") (emphasis added); 40 Fed. Reg. at 31321, 31325 (1975); 1986 RGL 86-01 (U.S. Br. Add. 12a) (plowing for food production "is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations"); 33 C.F.R. §§ 323.2(f), 323.4(a)(1)-(iii)(D). Having long stated that plowing does not result in a discharge, the agencies should not now be heard to assert (at 36-37) "that even ordinary plowing may result in a discharge." See *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 130 (1983).

Congress in 1977 included normal farming activities in Section 404(f)'s enumeration of non-prohibited activities to *reinforce* their previously established exclusion from the regulatory ambit of Section 404. 3 1977 LEG. HIST. 351 (statement of Rep. Hammerschmidt) ("These exemptions reemphasize that Congress never intended [normal farming, ranching, and silviculture activities] to be considered discharges of dredged or fill material"); see Pet. Br. 36-39 (citing numerous statements from legislative history to same effect). Congress considered this reinforcement and clarification desirable because the Corps, in an odd but well-documented effort to *limit* its jurisdiction, had issued a press release threatening to claim authority over a wide array of agricultural activities. See AFBF Amicus Br. 6-8.

Congress in Section 404(f)(1) did not purport to modify the statutory definition of "discharge." On its face, that provision

merely states that if any "normal farming and ranching activities" result in a discharge, those activities should nevertheless be exempt. Normal farming activities such as plowing are not mentioned at all in the narrow recapture provision, Section 404(f)(2), which obviously applies only to activity that is a "discharge" covered by Section 404(a) that would otherwise be exempt under Section 404(f)(1). Nothing in Section 404(f) suggests that plowing like that engaged in by Borden Ranch, which does not "add" a "pollutant" from a "point source," results in regulated "discharges." The provision also exempts "seeding" and "harvesting," which it is likewise difficult to imagine resulting in "discharges."

The Corps' RGL 86-01, issued to provide mandatory guidance to Corps field offices, confirms the limited import of Section 404(f): "Plowing for the purpose of producing food * * * is not subject to any of the provisions of Section 404 including the Section 404(f) exemption limitations. Section 404(f) is applicable to those activities that do involve a discharge but are statutorily exempted from the need to obtain a 404 permit." U.S. Br. Add. 12a.[9] See also 58 Fed. Reg. 45008, 45012 (1993) ("We agree * * * that Section 404(f)(2) does not expand the scope of activities subject to Section 404"); CWA § 404(f)(2) (recapturing only certain "discharge[s] of dredged or fill material"). Deep plowing to grow deep-rooted crops was never within the purview of § 404(a), and the 1977 amendments did not place it there.

I.e. The government's brief paints a misleading picture of petitioners' conduct and the nature and extent of their activity

[9] Although RGL 86-01 states that it would expire after 1988, the Corps advises the regulated community that guidance provided "generally remains valid after the expiration date" until "superseded by specific provisions of subsequently issued regulations or RGLs." Preamble to Corps RGL Index (http://www.usace.army.mil/inet/functions/cw/cecwo/reg/rglsindx.htm).

in seasonal wetlands. Tsakopoulos did not intend to deep plow or discharge fill into the Ranch's swales and other drainage features, merely to cross them in the course of plowing surrounding uplands. Pet. 9-11; Pet. Br. 12-14; Pet. App. 143.[10] He attempted to follow the Corps' oral guidance—not mentioned in Respondents' brief—that he could cross them with raised shank without a permit. Pet. 9-11; Pet. Br. 12-14. The district court found plowing depth irrelevant and held that even shallow, raised-shank plowing violates Section 404. Pet. App. 123-124. Contrary to the government's assertion (at 14-15 & n.11), the district court did not find that any deep ripping occurred in the areas at issue after November 1996. Pet. App. 79-82, 103-104.

Government amici pretend this case is about "streams," "seagrass beds," "bays, estuaries and deltas," "rivers, lakes, perennial streams" (NWF Amicus Br., passim), "irrigation ditches" (Zedler Amicus Br. 14), "swamps" (*id.* at 8), the Everglades (*id.* at 10), "oxbow lakes and mudflats" (*id.* at 12) "mined streams" (*id.* at 23, n.38), and "salt marshes." *Id.* at 24, n.39. It is not. Those are all substantial "waters" and "wetlands" that could not be plowed in their natural state, that could not

[10] The government's observation (at 16) that Borden Ranch affected about 2 acres of drainage features while deep plowing about 900 acres of uplands to plant grapes and apples shows petitioners' primary purpose to farm uplands while avoiding wetlands to the extent feasible. Borden Ranch's plowing did not involve extensive areas of jurisdictional waters. Pet. App. 77, 105. Only a minority of drainages affected were found "obliterated" (Pet. App. 86, 106) and those were located on a single parcel that the Ranch had not owned or plowed for about two years. Pet. App. 87-88, ER 527-625. To add perspective, this alleged "conversion" of less than one half acre of drainages to uplands (Tr. RT 1550-1551) occurred at a time when the Corps' top official, Col. John Reese, testified that up to one acre of wetlands could be completely destroyed under the Corps' regulations with no Section 404 permit. Tr. RT 127-131.

support heavy deep plowing equipment, and that bear no hydrological similarity to the normally dry, seasonally wet drainages on the semi-arid Borden Ranch.[11] The Borden Ranch's drainages differ because they can be plowed and farmed without prior manipulation and because they are not the "true marshes or swamps intended to be protected by Section 404." Pet. Br. 41, quoting Sen. Muskie comments.

The scientist amici focus on inappropriate types of wetlands and activities. This case does not involve "drainage" activities (2, 4, 5 & n.4), dikes, dams, levees, or other structures designed to divert water (10), nor does it involve waters or wetlands too wet to plow or farm (10-13), an attempt to regulate agricultural runoff as non-point source pollution (15-16), or the draining of the Everglades (24-25). The scientists' brief reflects a great deal of armchair academics and unfamiliarity with the land and issues *involved in this case*. Had they visited it, the scientists would know that Borden Ranch vineyards and orchards *do* have grasses growing between rows to control erosion and *do* benefit from drip irrigation and integrated pest management. *Cf. id.* at 16. The sediment runoff from agricultural uplands with which the scientists appear primarily concerned (at 15-16) is not even regulated under Section 404. Pet. Br. 26.

2.a. Even if petitioners' deep plowing were a "discharge," it would be exempt from federal regulation pursuant to Section 404(f)(1)(A)'s exemption for "normal farming * * * and ranching activities such as plowing * * * for the production of food." Regulations that purport to narrow the scope of that exemption to exclude plowing rangeland to make it suitable for

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[11] The obvious distinction is supported by the common sense "observations of a Kentucky farmer who said [wetlands] were lands 'too wet to plough and too dry to fish.'" R. GADDIE & J. REGENS, REGULATING WETLANDS PROTECTION: ENVIRONMENTAL FEDERALISM AND THE STATES 18 (2000).

growing crops and to exclude deep plowing are invalid, for they contradict the plain language of the statute. U.S. Br. 39-42.

As the government concedes, the plain meaning of "normal farming and ranching activities" is activities that are the "norm" or "rule" for farmers and ranchers and that "confor[m] to [the] type" or "standard" of farming and ranching activities. U.S. Br. 40 n.26, quoting WEBSTER'S THIRD. Deep plowing rangeland to grow crops qualifies as normal farming and ranching activity under that definition. It is something that farmers and ranchers have done across the Nation for hundreds of years, as they have adapted their operations to changing consumer demand, shifting commodity prices, government incentive programs, the availability of irrigation, and other factors. See AFBF Amicus Br. 14-16; California Farm Bur. Amicus Br. 14-18. Switching from growing forage to crop production, using whatever type of plowing is necessary to prepare the particular land for the particular crop, is normal farming and ranching activity because it conforms to what farmers and ranchers have long done and still do in the ordinary course of operating their businesses and is "considered routine." 3 1977 LEG. HIST. at 494 (Sen. Jennings).

It is impermissible for the agencies to interpret the plain language that Congress used to mean something entirely different. There is no reasonable sense of the phrase "normal farming or ranching activity" that excludes activity that switches land from one ranching or farming use to another—which is how the agencies nevertheless interpret the phrase in 33 C.F.R. § 323.4(a)(1)(ii) and 40 C.F.R. § 232.3(c)(1)(ii). See U.S. Br. 39-40. And there is no reasonable sense of the word "plowing," as an example of a "normal" farming and ranching activity, that excludes deep plowing merely because it breaks the hardpan in a seasonal swale or drainage allowing water to seep down to the root level of the new crop—which is how the agencies nevertheless interpret the word in 33 C.F.R. § 323.4(a)(1)(iii)(D) and 40 C.F.R.

§ 232.3(d)(4). See U.S. Br. 41. These definitions stray so far from the statutory language that they are entitled to no deference. On any reasonable interpretation, petitioners' deep plowing fits within the exemption set forth in Section 404(f)(1)(A).

2.b. Petitioners' deep plowing is not recaptured by CWA Section 404(f)(2). That provision applies only to an activity "having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," where the flow, circulation, or reach of waters is impaired. Borden Ranch has always been "subject to" use to grow a crop other than forage—something that could be achieved simply by plowing the land and planting, as had previously been done with portions of the Ranch. See Pet. App. 68 (Ranch has produced wheat, hay, alfalfa, tomatoes, beets, beans, and corn). Unlike a swamp or bog, the seasonal wetlands on Borden Ranch are plowable in their natural state, without prior filling or dredging.

Congress's oft-stated purpose not to impose the CWA's time-consuming and costly permitting process on ordinary farm and ranch activities may not be thwarted by treating a switch from one crop (forage for cattle, which on private rangeland is often seeded and cultivated) to another crop (grapes and apples) where the activities associated with *both* of those uses fit squarely within the agricultural/ranching exemption. A change from one use exempt under Section 404(f)(1)(A) to another cannot reasonably be treated as bringing the land into "a use to which it was not previously subject," where the change merely requires plowing land that is tillable in its natural state. Insofar as 33 C.F.R. § 323.4(a)(1)(ii) is intended to recapture those sorts of commonplace and necessary changes in agrarian land use, it is unreasonable and not entitled to deference. That the second crop has different water needs, requiring deeper plowing to prepare the soil, makes no difference. Congress distinguished between changes wrought in the "flow," "circulation," and "reach" of navigable waters and subjecting those waters to a

new use. *Both* elements must be present before recapture occurs. The agencies are not free to make changes in hydrology all that count. See U.S. Br. 45-46 (identifying as exempt only a "change from one wetland crop to another"); 1996 Field Memorandum, Pet. App. 206-207 (stating that regardless of intended use, "deep-ripping" in "depressional wetlands" is recaptured because of its effect on "the hydrological integrity" of the wetland).

3. The government offers no justification in its brief for treating each pass of a ripper through a jurisdictional feature as a separate violation triggering a separate $25,000 penalty. In fact, the government's interpretation—which has never been set forth in regulations or guidance and is entitled to no deference—is unreasonable because it has ridiculous results. For a narrow linear wetland that could be deep plowed in two passes along its length but only in twenty across its width, whether the maximum penalty is $50,000 or $500,000 depends on whether the farmer plowed across or along the field, though the impact on the wetland may be identical either way. And fewer passes with a wider shank would produce a lower penalty than if the farmer used a narrower shank that required more passes. Beyond these absurdities, treating each pass of a plow as a violation lacks a rational basis. It in no way correlates to the number or extent of "additions" of pollutants, to extent of damage, amount of material moved, intent, or any other conceivably relevant factor (as the example of the two ways to plow a linear wetland shows). It is arbitrary, and turns the size of the maximum penalty in a particular case into a mere fortuity.

To treat each pass with the plow as a separate violation triggering its own penalty creates no desirable incentive. The government has identified no benefit from providing incentives to plow in a single sweep, with long passes, or with wider shanks to minimize possible penalties. While the government and courts below assert that application of Section 309(d)

should not create incentives to pack dredging and filling into a single day, it is equally unclear why they should create incentives to design plowing patterns with the fewest number of passes. Other statutory provisions deter intentional conduct (Pet. Br. 50), and disincentive to continue violations once discovered already exists by virtue of the courts' statutory discretion to consider good faith efforts to comply and the seriousness of violations to downwardly adjust maximum penalties. 33 U.S.C. § 1319(d).

Rather than respond to our argument, the government inexplicably asserts that we did not raise it below. U.S. Br. 48. The Ninth Circuit, however, described our argument as being that the penalty should "not [have been based] on the number of individual passes with the ripper" (Pet. App. 13) and "that treating each rip as a separate violation could lead to nonsensical results." Pet. App. 15. It rejected those arguments when it ruled that "each pass of the ripper [i]s a separate violation." Pet. App. 16. Clearly, this issue was preserved and ruled upon below and is properly before this Court.

The addition to a wetland of dredged or fill material by the same method on the same day is properly a single violation. There is no rational basis for subdividing it into separate passes of the plow, turning a single activity into numerous distinct violations. Under that approach, the government concedes (at 50 n.35), the maximum penalty would have been considerably less than that used by the district court in its calculations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2002